In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-737

ARKANSAS LOUISIANA GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Petitioner, a natural gas pipeline company, challenges one aspect of Federal Power Commission orders prescribing a plan for the curtailment of gas deliveries to petitioner's customers during periods of anticipated supply shortages.

The plan establishes a schedule of allocation priorities (Pet. App. 63a-64a) based principally upon the "end use" of the gas to be delivered—*i.e.*, the use to be made of the gas by its ultimate consumer. The Commission stated (*id.* at 48a):

> We are impelled to direct curtailment on the basis of end use rather than on the basis of contract simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of

> a firm contract to deliver gas for an inferior use, at the expense of reduced deliveries for priority uses, is not compatible with consumer protection.

Most of petitioner's sales are made directly to industrial customers. Sales for resale are made only to a few customers, one of which is Mississippi River Transmission Corporation (MRT) (*id.* at 31a). Petitioner's contract with MRT provides that petitioner will deliver "such gas as seller is agreeable to selling and buyer is agreeable to buying" (*id.* at 40a). While "not here determining the amount of gas to be delivered to MRT and in what priority categories," the Commission determined that, notwithstanding the form of the contract, "the gas to be delivered to MRT will be measured by the end uses of the gas by MRT's customers as applied to the schedule of priorities" (*id.* at 71a). The Commission stated (*id.* at 59a):

> While [petitioner's] contract with MRT provides for interruptible service, a curtailment plan which would prevent MRT from receiving any gas, even for residential service, while the boiler fuel users receive gas is discriminatory and unjust and unreasonable. * * * [W]e must look beyond the contracts between [petitioner] and its customers to the end-use of gas.

The court of appeals set aside portions of the Commission's orders (Pet. App. 27a), but it upheld the Commission's determination to base curtailment priorities on the end use of the gas, notwithstanding any contrary provisions of petitioner's contracts with its customers generally and with MRT in particular (*id.* at 12a-17a).

Petitioner's only contention here is that the Commission lacks authority to give gas allocation priority to MRT, because that would require overriding the "seller's option" terms of petitioner's contract with MRT. That contention is answered by this Court's decision in *Federal*

Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621. The Court there ruled that the Commission "may order pipelines facing shortages to develop and submit rational curtailment arrangements" and may permit "the pipeline's tariff amendments to take effect despite contrary terms in existing contracts" (406 U.S. at 646). "[T]he Commission is not bound by agreements among parties subject to its jurisdiction" when the resulting classification would be unjust, unreasonable, or unduly discriminatory. *American Smelting and Refining Co.* v. *Federal Power Commission*, 494 F. 2d 925, 934 (C.A. D.C.), certiorari denied *sub nom. Southern California Gas Co.* v. *Federal Power Commission*, 419 U.S. 882.

As the court of appeals correctly held in the present case, the Commission "found that a plan preventing MRT from getting any gas would be 'discriminatory and unjust and unreasonable', and the Commission is therefore entitled to prescribe alternative arrangements" (Pet. App. 17a). It "is not *required* to place interruptible users such as MRT in lower categories than firm users" (*ibid.*; emphasis in original).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DREXEL D. JOURNEY,
General Counsel,
Federal Power Commission.

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